IN THE

Supreme Court of the United States

October Term, 1962.

No. 509.

ELIJAH REED,

Petitioner,

v.

STEAMSHIP YAKA, Her Engines, Boilers, Machinery, Etc. (Waterman Steamship Corporation, Owner and Claimant)

and

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT PAN-ATLANTIC STEAMSHIP CORPORATION.

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COUNTER-STATEMENT OF QUESTION INVOLVED.

May a longshoreman, injured in the course of his employment, recover damages in an admiralty action *in rem* against the ship where his employer is owner *pro hac vice* of the vessel and has complied with its obligations under the Longshoremen's and Harbor Workers' Compensation Act?

COUNTER-STATEMENT OF THE CASE.

The petitioner, Reed, was a longshoreman employed by the respondent, Pan-Atlantic Steamship Corporation. Pan-Atlantic was the owner *pro hac vice* of the SS YAKA, having chartered it under a demise or bareboat charter from the owner, Waterman Steamship Corporation.

Pan-Atlantic maintains its own stevedoring division and in certain ports its own employees load and unload vessels of which it is owner and also vessels which it is operating as owner *pro hac vice*.

While so employed by Pan-Atlantic the petitioner, Reed, was injured. A cargo tray or pallet had been used to bring cargo aboard the ship during the unloading operation. While the cargo tray was being temporarily used to form a staging upon which incoming cargo was landed, a board of the cargo tray broke when Reed stepped upon it. This caused the injury for which this suit was brought.

Reed's first action was a suit in admiralty *in personam* against Waterman Steamship Corporation, the owner of the YAKA. Upon a preliminary motion seeking dismissal on exceptions to the libel the district court indicated that unless Reed could show that unseaworthiness of the ship which had caused injury existed prior to the time the vessel was demised to Pan-Atlantic, Reed could not recover in that suit against Waterman. On the same day that decision was handed down Reed instituted the present action *in rem* against the YAKA. Waterman claimed the vessel and joined Pan-Atlantic as an Additional Respondent.

Reed's *in personam* suit against Waterman has since been dismissed on the merits and no appeal was taken from that judgment.

On the trial of the present action the district court found in favor of Reed. It based its decision on a finding of unseaworthiness by reason of the latent defect in the cargo tray. Although a finding of negligence was requested by the petitioner, the district court refused to find negligence on the part of either Waterman, the owner, or Pan-Atlantic, Reed's employer.

SUMMARY OF ARGUMENT.

Congressional intent to regulate and restrict the employer-employee relationship is clear. It was unquestioned for thirty years. During that period numerous attempts to breach the line which Congress had drawn were rejected by judicial decisions. The Compensation Act has been frequently amended. If the prior judicial decisions have not been in keeping with the intent of Congress, there has been ample opportunity for Congress to correct it. The fact that Congress has never even attempted to bring about the exception for which petitioner argues is substantial evidence that Congress agreed with the judicial decisions limiting the liability of the employer to those liabilities which Congress imposed.

There is no distinction, valid for the purposes of this case, between an owner of a ship and an owner *pro hac vice* of a ship. The owner out of possession and control of the ship is not legally responsible, upon principles of tort or warranty, for that which occurs after the owner has surrendered the vessel to the demisee. Congress might have altered the pattern if the results were not consonant with Congressional policy. There are other statutes and other rules of law which have been construed by this Court to forbid recovery by the device of an action *in rem* where statute or rule of law has precluded or abolished liability *in personam*. The present case is only one more instance of a statutory intent to restrict the imposition of liability against an employer-shipowner [*pro hac vice*] under the particular circumstances of this case.

Other limitations upon liability have been recognized where they involved damage to cargo by fire, where sovereign immunity has been inconsistent with the concept of a separate liability of the inanimate ship. Where claims *in personam* have been outlawed by the application of the statute of limitations, the courts have refused to permit

the device of liability *in rem* to serve as a substitute to achieve a different result. This rule of law is not to be cast aside because the statutory restriction upon liability is part of a statutory workmen's compensation scheme.

The concept that there might be a liability solely *in rem* where liability *in personam* has been abolished or does not exist had its origin in forfeiture statutes. No one disputes Congressional power to declare a forfeiture, granted due process. But forfeiture statutes are not based upon maritime liens and do not truly support the concept of liability solely *in rem*.

There is fundamental inconsistency in imposing liability solely *in rem* [without underlying personal liability] upon the basis of warranty. The concept of warranty by an inanimate object is fundamentally illogical.

With one exception, all of the lower courts which have dealt with the problem of liability solely *in rem* have decided it in the same way as the court of appeals decided the case at bar. The arguments advanced by petitioner for reversal will not stand careful analysis.

ARGUMENT.

When Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, it inserted the following provision:

> "The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury . . ." 33 U. S. C. A. 905.

The record in this case is clear. The petitioner, Reed, was in the employ of Pan-Atlantic. Pan-Atlantic was the owner *pro hac vice* of the SS YAKA at the time of Reed's injury. The owner, Waterman, had completely and exclusively relinquished "possession, command and navigation" to the demisee, Pan-Atlantic. *Guzman v. Pichirilo*, 369 U. S. 698 at 699. The cause of Reed's injury was a defective piece of equipment owned by Pan-Atlantic and brought on board the vessel shortly before the accident. If this constituted unseaworthiness, it was not unseaworthiness which pre-existed the demise of the vessel to Reed's employer, Pan-Atlantic.

Reed's first suit was against the owner, Waterman Steamship Corporation. That was an *in personam* action. In that action, Waterman filed peremptory exception to the libel and raised the question of its non-liability as owner for unseaworthiness arising after the demise and while the vessel was in the exclusive custody and control of an owner *pro hac vice* under a bareboat charter. In a decision not officially reported[1] Judge Kirkpatrick filed an opinion indicating there could be no liability on the part of the owner for unseaworthiness arising after the demise. He did not dismiss the libel because of the fact question as to when the unseaworthiness had arisen. On the same

1. Reported only at 1958 AMC 658.

day that decision was handed down, the present libel was filed against the ship *in rem*.

Reed's suit against Waterman has since been dismissed after hearing and, no appeal having been taken, that Judgment is now final.

In the thirty-seven years since Congress enacted the Longshoremen's and Harbor Workers' Compensation Act and provided that the remedies thereunder should be exclusive as between employer and employee, there have been a number of attempts to circumvent the intent of Congress. Until 1956 the decisions among the lower federal courts had been unanimous. Attempts to circumvent the statutory provision were uniformly rejected. *Samuels v. Munson Line*, (1933) 63 F. 2d 861 (C. A. 5); *Smith v. The Mormacdale*, (1952) 198 F. 2d 849 (C. A. 3); *Conzo v. Moore-McCormack Lines, Inc.*, (S. D. N. Y.) 114 F. Supp. 956 (1953); *Bennett v. Mormacteal*, (E. D. N. Y.) 160 F. Supp. 840 (1957); affirmed on the opinion of the district court, 254 F. 2d 138 (1958); cert. denied, 358 U. S. 817.

There was a similar result when the similar provision of the Compensation Act for Puerto Rico was tested in the same manner. *Flores v. Prann*, (1959) 175 F. Supp. 140. A different method of attack was attempted in *Ginnis v. Southerland*, 315 Pacific 2d 675 (Wash.).[2] That was an attempt to circumvent § 5 of the Longshoremen's Act by suing the ship's captain individually. The attempt was rejected.

The present case proceeds upon the premise that when Congress made the Compensation Act remedy exclusive as to any attempt to "recover damages from such employer at law or in admiralty on account of such injury", it did not really mean what it said. Rather, petitioner argues, the statutory language contained an implied exception where a suit in admiralty was brought *in rem* against

2. The decision of the lower court is reported only at 1956 AMC 2272.

the vessel of which the employer was only owner *pro hac vice* and not owner. There are a number of reasons why this Court should not approve this attempt.

A. Liability in Tort Is that of the Person Lawfully in Possession of the Ship. Where That Person Is Endowed With a Personal Defense Created by Statute, There Is No Distinct and Separate Liability In Rem.

> "The most important consequences of the distinction between the demise and the other forms of charters grow from the fact that the demise charterer is looked on as the owner of the vessel *pro hac vice*."[3]

Whether we call him bareboat charterer, owner *pro has vice*, or demisee, it is he who "is the warrantor of seaworthiness".[4] Case law on the point is uniform and clear. *Vitozi v. Balboa Shipping Co., Inc.*, 163 F. 2d 286; *Muscelli v. Frederick Starr Construction Co.*, 296 N. Y. 330, 72 N. E. 2d 536. As this Court has put it more recently, "a charterer who has control of the operations is owner *pro hac vice*".[5]

It is, then, clear and settled law that the owner out of possession, Waterman, would not be liable for the so-called unseaworthiness which consisted of a latent defect in a cargo tray or pallet which was brought on board the ship during the course of the loading operation after Pan-Atlantic had become owner *pro hac vice* by assuming possession and control and Waterman had surrendered those incidents of ownership.

This Court has frequently asserted that "without doubt Congress has power to alter, amend or revise the maritime

3. Gilmore and Black, "The Law of Admiralty" page 218, citing *Leary v. United States*, 81 U. S. 607, 610 (1872); *Reed v. U. S.*, 78 U. S. 591, 601 (1871).

4. Ibid.

5. *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 737, overruled on another point; *Cosmopolitan Shipping Co., Inc. v. McAllister*, 337 U. S. 783.

law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employer's Law or general provisions for compensating injured employees; . . .".[6] In the case at bar Congress has intervened. It has provided that the liability of Pan-Atlantic, which, in the ordinary case, would be said to have warranted the "seaworthiness" of YAKA and of the cargo tray, is limited to those benefits Congress has provided in the Compensation Statute. No matter what Pan-Atlantic's liability might be in the absence of statute, it is respectfully suggested that judicial modification of the Congressional scheme is inappropriate. Congress clearly had the power to so modify maritime law to provide its own particular remedy where the employment relationship existed. There are numerous similar instances of limitations and modifications of liability both by statute and by interpretation of the general maritime law.

Probably the best known statutory modification is the so-called Fire Statute, 46 U. S. C. A. 182, 186. This Court had an almost identical problem with respect to that statute in the case of *Consumers Import Co., Inc. v. K. K. K. Z.*, 320 U. S. 249. In that case, goods which had been carried by sea were damaged by fire. The shipowner brought himself within the terms of the Fire Statute and by its terms he was free of liability *in personam*. The cargo owner brought an action *in rem* and this Court was squarely presented with the question of whether there could be a separate *in rem* liability of the vessel where a statute of the United States operated to extinguish the personal liability. There this Court said:

> "Claimant says this (exoneration of owner from in personam liability) means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execu-

6. *State of Washington v. Dawson*, 264 U. S. 219, 227; recently quoted with approval by this Court in *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 120.

tion against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them." 320 U. S. at 253, 254.

In deciding the *Consumers Import Co.* case, this Court pointed out that as early as 1886, the courts of this country had rejected the thesis that there could be a liability of property, separate and apart from personal responsibility. The case relied upon was *The Norwich (Place v. Norwich and New York Transp. Co.)*, 118 U. S. 468, where the Court said:

"To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a bound cargo or illegal trade; and it may even be called 'the guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his

property. It is true that in *U. S. v. Mason*, 6 Biss. 350, it was held that in a proceeding *in rem* for a forfeiture of goods the owner might be compelled to testify, because the suit is not against him, but against the goods. That decision however, was disapproved by this court in the case of *Boyd v. U. S.*, 116 U. S. 616, 637, in which it is said: 'Nor can we assent to the proposition that the proceeding (*in rem*) is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great judge: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." ' VAUGHAN, C. J., in *Sheppard v. Gosnold*, Vaugh. 159, 172; approved by PARKER, C. B., in *Mitchell v. Torup*, Parker, 227, 236."

B. Where the Owner Is Not Liable in Personam and the Liability of the Owner Pro Hac Vice Has Been Validly Limited by Statute and That Limited Liability Has Been Satisfied, There Is No Separate Liability of the Ship In Rem.

The theory of the personification of a vessel is a convenient shorthand method of expressing legal results, but the theory is not a satisfactory basis for imposing a liability, particularly where Congress has created a personal defense. The personification theory has been used by many Courts as an expression of results reached, but the fact that it was a fiction has always been recognized where that became important, and the fiction has been discarded in many instances. It was discarded in the landmark case of the *Tug Eugene F. Moran*, 212 U. S. 466 (1909). The question was whether a car float which was in charge of a tug was answerable for the proportionate share of the damage resulting from the collision into which the tug

had brought the float. The personification theory was rejected in an opinion by Mr. Justice Holmes writing for a unanimous Court:

> ". . . No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England. . . . Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it was desirable to have some one who was able to pay. . . . But after all a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be eye ended. . . ."

If there was in fact a liability of the vessel *in rem*, separate and apart from the liability of the owner *pro hac vice*, then this Court's decision in *The Western Maid*, 257 U. S. 419 (1922) was not properly decided. There the United States sold some vessels of which it had been owner and returned to the original owners some vessels of which it had been owner *pro hac vice*. All had been involved in collisions or incurred similar casualty while being operated by the government. The suits were *in rem* against the vessels. Holmes, again writing for the Court, said:

> "It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person, but that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force . . . The personality of a public vessel is merged in that of the sovereign . . ."

> "But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp . . ."

Much of American maritime law and maritime tradition has its roots in the law of England. In the same year that this Court decided *The Western Maid*, the English Privy Council reached the same result with respect to a vessel of the United States. [See *The Sylvan Arrow*, (1923) P. 220] and wrote the celebrated opinion in *The Terrace*, (1922) P. 259, where the Privy Council said:

> "In my view it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants . . .
>
> ". . . But for a lien to arise . . . some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision.
>
> ". . . Neither the Belgian Government could have been sued in personam, nor could their ship have been arrested in rem. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property . . ."

This Court has refused to permit the condemnation of the ship *in rem* where neither the owner nor the person in possession and control of it was personally liable by reason

of a limitation upon the time for filing suit contained in the bill of lading. This Court held that when the time limit ran so as to prevent suit *in personam*, an action *in rem* after the time could not be maintained, saying:

> "The '*claim*' is in either case against the company, though the *suit* may be against its property." *The Queen of the Pacific*, 184 U. S. 49, 53 (1901).

Another instance where the personification theory, literally applied, would bring about a different result is in the tug and tow situation. A provision frequently inserted in such contracts is that the tow agrees to assume all risks and to exempt the towing company from liability for negligence of the crew of the tug during the towing operation. This is a valid provision.[7] Even though the exemption from liability is personal to the party to the contract, a tug performing the towing operation which is merely demised to that company is not liable *in rem*. See Price, "The Law of Maritime Liens", page 128; *The Elizabeth M. Miller*, 3 Fed. Supp. 171, 172; *The Oceanic*, 170 Fed. 893; *The St. Hubert*, 107 Fed. 727.

In *New York Dock Co. v. S. S. Pozan*, 272 U. S. 117 the ship was *in custodia legis*. During the period of such custody, charges for wharfage had accrued. The Supreme Court approved ". . . the general rule that there can be no maritime lien for services furnished a vessel while in custodia legis", 274 U. S. 117 at 120. See discussion of this case, page 498, *The Law of Admiralty*, Gilmore and Black.

Although the Court in the *Pozan* case allowed the wharfage as part of the administration expense because of action by the Court in directing the ship to proceed to the wharf to unload, the effect of the decision is to deny a maritime lien arising while *in custodia legis*. That is plain from subsequent decisions such as *Vlavianos v. Cypress*, 171 F. 2d 435, cert. denied 337 U. S. 924, where it was held that even a lien for crew's wages could not arise during the

7. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291.

time a ship was in the custody of the law. See also *Collie v. Fergusson*, 281 U. S. 52.

That the situation is no different whether the vessel be owned or merely bareboat chartered is made clear by the decisions of this Court in *Ex Parte New York No. 1*, 256 U. S. 490, and *Ex Parte New York No. 2*, 256 U. S. 503. See also *The Anne*, Fed. Cas. 412, where Mr. Justice Storey rejected the personification theory in its strict sense.

The most recent decision where this Court has commented upon the concept of an *in personam* liability separate and apart from liability *in rem* is *Continental Grain Co. v. Barge FVL-585*, 364 U. S. 19 (1960). The argument was there made that a libel with a count against the vessel *in rem* and a separate count against her owner *in personam* involved two separable and distinct claims. This Court commented that such an argument was founded upon "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment". This Court went on to say:

> "This fiction relied upon has not been without its critics even in the field it was designed to serve. It has been referred to as 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. . . .
>
> "This Court has not hesitated in the past to refuse to apply this same admiralty fiction in a way that would cut down, as it would here, the scope of congressional enactments. In fact, Mr. Justice Bradley, speaking for the Court, said at one time, in construing a statute which had limited a shipowner's liability but had failed to refer to the 'personal' liability of the vessel:

"'To say that an owner is not liable but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated. . . .' *The City of Norwich*, 118 U. S. 468, 503 [1886].

"Fifty-seven years later, this Court was confronted with a similar argument about another section of the same statute, and after referring to the analysis in *City of Norwich* concluded,

"'The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . . Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property.' *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249, 253-254 [1943]." *Continental Grain Co. v. Barge FBL-585*, 364 U. S. 19, 23-24.

The idea of the personification of a vessel, which is said by some writers to be a part of the law of this country, is more apparent than real. Those who argue for it fail to distinguish, as we submit this Court has by its past decisions, between liability *in rem* and a forfeiture. More precisely, the distinction which really must be made is between a forfeiture and a warranty. The arguments which petitioner makes ignores these distinctions.

Price, in his work "The Law of Maritime Liens", p. 8, discusses the various theories and comments:

"Unless the above explanation [the law of deodand] be accepted, the lack of evidence casts some

doubt on the theory which endows the ship causing damage with an actual personality, especially since it is in the early records that we should expect to find the lien for damage most prominent if it sprang from the primitive notions of deodand (*x*). Actually the lien for collision damage does not seem to have been definitely established till the decision in *The Bold Buccleugh* (*y*). Moreover there are other objections to the theory, for it is improbable that the Court of Admiralty, whose law and practice were based on the civil law, would have been receptive of such primitive ideas (*z*). There is also some evidence to show that no lien for damage was created, for in Browne's Admiralty Law (*a*) it is stated that "the torts of the master cannot be supposed to hypothecate the ship, nor to produce any lien on it".

(*x*) Holdsworth, H. E. L., vol. VIII, p. 272.
(*y*) (1851), 1 Moo. P. C. 267.
(*z*) Holdsworth, *ibid.*
(*a*) Civil Law and Admiralty Law, 1802, Vol. II, p. 143.

No one would seriously question the power of Congress to enact a statute calling for the forfeiture of impure food or a noxious drug. Legislation providing for the forfeiture of the automobile or other instrumentality of transportation engaged in carrying untaxed and illicit beverages or drugs are common examples of this exercise of the legislative power. We stress that this is the exercise of a legislative function and not judicial interpretation of maritime law, common law or even an inherent power of the courts.

Thus to confuse liability *in rem* with forfeiture under a statute for violation of an embargo act, a criminal act of piracy, or of an automobile engaged in the illicit transportation of alcoholic beverages is to confuse basic concepts. One text [8] comments:

"These forfeiture cases [9] had nothing to do with mari-

8. Gilmore and Black, "The Law of Admiralty", page 487.

9. *The Little Charles,* Fed. Cas. No. 15,612; *The Palmyra,* 25 U. S. 1; and *The Brig Malek Adhel,* 43 U. S. 210.

> time lien law or even with admiralty law. They brought up what we would call today 'due process of law' questions. If the quoted passages from the opinions of the two great judges are read with care, it becomes apparent that neither Marshall nor Storey was thinking of admiralty law except in terms of the loosest possible analogy and that no 'principle' of admiralty law was being laid down."

There is a discussion of the entire subject by Gilmore and Black commencing at page 483 and ending at page 510. These writers begin their discussion with the statement:

> "Clarity of thought is not promoted when, by an accident of linguistic history, two unlike things are called by the same name. Growth by analogy has been one of the law's great strengths but when the analogy hit upon is false the result is confusion and stalemate." [page 483]

They end their discussion with the observation:

> "It may be concluded that the fiction of ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute, thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed." [p. 510]

C. The Concept of the Warranty of Seaworthiness and Liability of an Inanimate Object In Rem Are Inconsistent.

The genus of the so-called "warranty of seaworthiness" has never been clearly defined. This Court's deci-

sions indicate it is based on relationship[10] or status.[11] No statement of the warranty, however, has ever suggested that it is consistent with the concept of the ship as an offending instrument. Yet the concept that the instrumentality held liable *in rem* is an "offending thing" is basic to the concept of the inchoate lien which in turn is the basis of the assertion that there is a liability solely *in rem* without some underlying liability *in personam*. Surely modern American law has long since abandoned any concept of "deodand", but if liability *in rem*, without an underlying liability *in personam*, is to be anything more than a security device, then logically we must retreat to the concept of "deodand". Can it be said that an inanimate object, a ship, extends a warranty that some human—and supposedly superior being—will not bring aboard the ship [inanimate and powerless to prevent it] a cargo tray which is defective? Surely liability so imposed could be based only on the concept of "deodand", for is not a warranty contract? Does not contract and/or warranty presuppose someone *sui juris* and capable of making a contract, express or implied, by representation or by voluntary and reasoned decision? Yet, logically the "deodand" concept would forfeit only the offending pallet and not the ship which was merely the *locus* where the offending instrumentality operated.

Petitioner must necessarily rely upon this Court's decision in *The China*, 74 U. S. 53 (1868) and certain statements by Mr. Justice Holmes in *The Common Law*. Whether this Court's decision in *The China* be regarded as the outer limit of the personification theory or as a case of special circumstance explainable upon other grounds, nevertheless, there are important distinctions. In *The China* there was an underlying personal liability, that of the pilot. There are authoritative texts which suggest that the rationale of this Court in its decision in *The China* was based upon misunderstanding of the English law. This is not to

10. The Jones Act, 46 U. S. C. A. § 688.

11. *Seas Shipping Company v. Sieracki*, 328 U. S. 85.

suggest that the result reached in that decision was not correct—merely that the reasons in support of it did not necessarily go so far as its advocates believe. See Marsden's "Collisions at Sea" 9th Ed. pp. 225 and 226. It is there suggested:

> "It is hard to understand why, because the state insisted, on the one hand upon persons who exercised the office of pilots within certain districts being duly educated for the purpose, and insisted on the other, that masters should within these districts take one of these persons on board their ships to superintend the steering, *the usual relation between owner and servant was to be entirely at an end.*[fn]" [Emphasis ours.]

[fn] *The Halley* (1867), L. R. 2, A & E 1, 16 (Sir R. Phillimore). See also Per Lord Stowell, *The Neptune II* (1814), 1 Dods. 467.

In any event the English rule of non-liability of the ship's operator for the negligence of a so-called "compulsory" pilot was shortlived, if it was ever soundly based. *Modern* concepts of agency would almost surely reach the same result the Court did in *The China*, but upon agency principles rather than any concept of "personification of the vessel" [as suggested by Marsden].

D. The Decision Below Is in Accord With Decisions by Other Courts of Appeal.

In a 1956 decision by the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919, Judge Learned Hand, speaking for a two-to-one majority, said that he:

> "could see no reason why a person's property should never be held liable unless he or someone else is liable *in personam*".

That concept has not been followed, even by the Court which wrote it. In 1960, Judge Hand again wrote for the

Second Circuit in *Latus v. United States*, 277 F. 2d 264, and there said:

> ". . . , an implied liability in rem, regardless of any personal duty of the owner, is a fiction, reaching far back into the early history of the law; and as has been often quoted, 'a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong. The Eugene F. Moran, 212 U. S. 466'. We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner when that fault is not that of a 'bareboat' charterer, or of some specified class of person like a compulsory pilot.
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> • • •
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> Grillea v. United States, 2 Cir., 232 F. 2d 919, merely held that a longshoreman might sue a ship in rem if he was injured by her unseaworthiness, . . ." 277 F. (2) at 267.

Judge Hand's language in *Grillea* may well be described as inscrutable. The *Grillea* language was in direct conflict with the language used by the same judge writing for a Court composed of identical personnel in *Burns Brothers v. Central R. R. of N. J.*, 202 F. 2d 910. In that case, a second suit, this time *in rem*, was held barred by an earlier action although it is perfectly clear that had there been a distinct and separate liability *in rem*, the result which the Court reached in *Burns Brothers* could not have followed.

This Court has already noted that the result reached by the Court of Appeals in this case is the same reached by the Court of Appeals for the First Circuit when it had the problem before it. *Guzman v. Pichirilo*, 369 U. S. 698, at 699. As already pointed out, the Court of Appeals for the Second Circuit has also aligned itself with these courts in its more recent decision in *Latus v. United States*, 277 F. 2d 264 (1960). The Court of Appeals for the Fourth

Circuit reached the same result. *Noel v. Isbrandtsen*, 287 F. 2d 783, 785 (1961), cert. denied, 366 U. S. 975.

There is inherent conflict between the first *Grillea* and second *Grillea* decisions.[12]

E. Petitioner's Argument.

Aside from reliance upon *Grillea*, the petitioner seeks to support his contention principally upon three pegs, *Plamals v. The Pinar del Rio*, 277 U. S. 151 (1928); *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946) and certain statements in *The Common Law* by Mr. Justice Holmes.

It is first worthwhile to note that this Court has since specifically disapproved a part of its holding in *Plamals v. The Pinar del Rio*. See *Mahnich v. Southern Steamship Co.*, 321 U. S. 96 at 105. Petitioner does not seek to sustain his argument upon the disapproved portion of the *Plamals* decision of course, but when the remainder of the *Plamals* decision is analyzed, it does not support petitioner's contention. The *Plamals* decision indicated that Congress could have, but did not, give a right *in rem* when it enacted the Jones Act. This recognition of Congressional power, applied to our case, surely indicates the authority of Congress to strip a longshoreman of his right to proceed *in rem* as part of the *quid pro quo* for the absolute liability imposed upon the employer by the Longshoremen's and Harbor Workers' Compensation Act, § 905.

There is nothing about *Seas Shipping Company v. Sieracki, supra*, which is helpful to petitioner. In *Sieracki*, this Court recognized that the Compensation Act did restrict and nullify the right of an injured longshoreman against his employer, for the Court noted [328 U. S. at 102] the situation where the shipowner was also the employer as an exception to the rule of *Sieracki*. It pointed

12. Compare *Grillea v. United States*, 229 F. 2d 687 with *Grillea v. United States*, 232 F. 2d 919.

out that this was a "presumably rare" situation. This is one of those rare cases where the longshoreman is in fact in the employ of the owner *pro hac vice* of the vessel.

Reliance upon certain statements in *The Common Law* is misplaced. True it is that Holmes called a ship "the most living of inanimate things."[13]

Holmes also pointed out[14] that ". . . to say 'the ship has to pay for it' was only a dramatic way of saying that somebody's property was to be sold, and the proceeds applied to pay for a wrong committed by somebody else".

It is interesting to compare Holmes' discussion in *The Common Law* with his decisions as a judge. He wrote for this Court in *The Western Maid, supra,* denying the personification theory and followed it in *The Eugene F. Moran, supra,* again denying the personification theory. Holmes certainly recognized that liability *in rem* is a security device peculiarly adapted to maritime commerce in order to obtain jurisdiction and security for claims which arise far from any jurisdiction where the owner may be reached personally. See the discussion at pages 29 and 36, *The Common Law.* See also Holmes' later comment, Vol. 2, Holmes-Pollock letters, page 135, where Holmes is discussing a criticism of his decision in *The Western Maid.* See also the discussion on the same point, Gilmore & Black, *supra,* pages 500-501.

Other authorities relied upon by petitioner can be used to demonstrate the weakness of petitioner's basic argument. The distinction between *in rem* liability for tort and a statutory provision for forfeiture was recognized by this Court in *The Palmyra,* 25 U. S. 1 at 15, 16.

F. The Indemnity Provision in the Charter Contract Neither Justifies Nor Calls for a Different Result.

It is elementary that the indemnity provision in the contract between Waterman and Pan-Atlantic does not cre-

13. *The Common Law,* page 26.
14. *The Common Law,* page 29.

ate rights in third parties. This is a rule of general application in indemnity contracts. More important, however, is that this provision of the contract is merely declarative of the general law upon the subject. Ever since this Court's decision in *The Barnstable*, 181 U. S. 464 (1901) it has been clear and unquestioned that one of the obligations of a demisee is that he is required to return the ship free and clear of liens of all sorts which arose by reason of the operations of the owner *pro hac vice* during the period of the demise. As the district judge pointed out in the case at bar,

> "However, the reasons why an *in rem* action against the vessel in such a case is realistically viewed as an action against the stevedore (and thus barred under the act) are not traceable to any contract of indemnity between parties", (R. 71a)

The law is clear. The owner *pro hac vice* must return the ship to the owner free and clear of liens resulting from the operation by the demisee. Thus where Congress has in clear words [15] exempted the demisee from liability "at law or in admiralty", the Congressionally granted immunity should not be emasculated. If petitioner would have a remedy other than compensation against his employer, his petition should be addressed to Congress and not to the courts. This is particularly true where, as here, the Congressional enactment has been uniformly interpreted by so many courts over such a long period of time.[16]

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15. 33 U. S. C. A. 905.

16. *Vitozi v. Balboa Shipping Company, Inc.*, 163 F. 2d 286 (C. A. 1, 1947); *Samuels v. Munson SS Lines*, 63 F. 2d 861 (C. A. 5, 1933); *Smith v. The Mormacdale*, 198 F. 2d 849 (C. A. 3, 1953); cert. denied 345 U. S. 908; *Bennett v. The Mormacteal*, 160 F. Supp. 840, 254 F. 2d 138 (C. A. 2, 1958); *Noel v. Isbrandtsen Co.*, 287 F. 2d 783 (C. A. 4, 1961); *Pichirilo v. Guzman*, 290 F. 2d 812 (C. A. 1, 1961); reversed on other grounds, 369 U. S. 698.

CONCLUSION.

Examination of the ancient decisions which are said to form the historical base for the concept of a liability *in rem*, separate and apart from any personal liability, will reveal that they concerned themselves largely with maritime liens for repairs and services where the vessel was away from its home port. The concept of a maritime lien upon a ship for services in its home port was rejected. Many of the early decisions concerned themselves with local statutes. The very concept of liability *in rem* separate and apart from personal liability cannot be logically sustained unless of universal application. Therefore, the fact that it was universally rejected in the home port and often was dependent upon local statute demonstrates that, however it may have been described in some decisions, there was not really a separate liability *in rem*. Rather it was a security device. In enacting the Longshoremen's and Harbor Workers' Compensation Act, Congress chose to divest the injured longshoreman of all common law and admiralty claims against his employer and to channel all of them into the Congressionally created remedy of compensation. That Congress clearly had a right to do. Nothing in Congressional history supports or permits a contrary conclusion. The decision of the court below was right and it should be affirmed.

Respectfully submitted,

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